

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re LILLY A., a Person Coming Under the
Juvenile Court Law.

KINGS COUNTY HUMAN SERVICES
AGENCY,

Plaintiff and Respondent,

v.

S.J. et al.,

Defendants and Appellants.

F077924

(Super. Ct. No. 16JD0184)

OPINION

THE COURT*

APPEAL from orders of the Superior Court of Kings County. Jennifer Lee
Giuliani, Judge.

David M. Thompson, under appointment by the Court of Appeal, for Defendant
and Appellant S.J.

Michelle L. Jarvis, under appointment by the Court of Appeal, for Defendant and
Appellant M.A.

* Before Levy, Acting P.J., Smith, J. and Snauffer, J.

Colleen Carlson, County Counsel, and Risè A. Donlon, Deputy County Counsel,
for Plaintiff and Respondent.

-ooOoo-

INTRODUCTION

A Welfare and Institutions Code¹ section 300 petition was filed on behalf of Lilly A. At a contested section 366.26 hearing held 20 months after the filing of the section 300 petition, the parental rights of S.J. (mother) and M.A (father) were terminated. Mother contends the juvenile court erred in terminating her parental rights after denying her section 388 request to change order and reinstate reunification services, because the evidence established the beneficial parent-child relationship exception applied as to her.

Father's appeal raises no issues as to his termination of parental rights. However, he asserts that if the termination of mother's parental rights is reversed, his parental rights also must be reinstated.

We affirm.

FACTUAL AND PROCEDURAL SUMMARY

Mother and father are the parents of Lilly. On November 17, 2016, the Kings County Human Services Agency (agency) filed a section 300 petition alleging then five-year-old Lilly was at substantial risk of serious harm. Mother was driving and involved in a single car accident on November 15, 2016. Mother crashed the car on Highway 99 after flipping it several times; Lilly was in the back seat. Lilly was admitted to Valley Children's Hospital. Mother was intoxicated at the time of the accident. It was alleged that father knew or should have known that mother abuses alcohol and drives while Lilly is in the vehicle and that father failed to protect the child.

¹ References to code sections are to the Welfare and Institutions Code.

The detention report noted that Lilly had been placed in out-of-home care after the accident. Mother and father had a prior substantiated referral history. Mother was arrested after the accident on child endangerment charges and for driving while under the influence of alcohol. There was a half-empty bottle of vodka in mother's bag at the time of the accident and an empty vodka bottle in the car.

A social worker interviewed Lilly before she was released from the hospital. When mother was interviewed by the social worker, she denied being under the influence of alcohol at the time of the accident and denied having any alcohol in her bag. During her interview, mother denied any issues with alcohol abuse. The social worker reminded mother there was a substantiated referral in 2015 from Kern County that mother was intoxicated while caring for Lilly. Eventually, mother admitted to drinking one beer the day of the accident and acknowledged that Lilly was not in a child car seat but was using a seat belt.

At the detention hearing, the juvenile court ordered that Lilly be detained in out-of-home care. The parents were to be provided with supervised visitation.

The agency filed a report for the jurisdiction and disposition hearing. The report detailed the history of referrals on the family dating from 2011. There were several substantiated referrals for general neglect of Lilly and one for emotional abuse of the child. The substantiated referrals reflected a history of alcohol abuse by mother and noted an instance of domestic violence perpetrated by father. Mother had been intoxicated in 2011 and 2015 while caring for Lilly.

Mother had been convicted of a DUI in 2011 and her driver's license had been suspended. Father had a conviction for inflicting corporal injury on a spouse or cohabitant.

The social worker spoke with Lilly about the accident and Lilly told her that mother "went the wrong way" and "couldn't stop." Lilly reported being "a little scared." Mother told Lilly to put her seat belt on; Lilly was not wearing the seat belt before the

accident. The accident report stated that mother had been driving erratically before the accident and her driver's license was suspended at the time of the accident. Mother failed a field sobriety test.

Mother told the social worker she had served in the Navy and was diagnosed with posttraumatic stress disorder (PTSD). Mother had been prescribed medication but stopped taking it prior to Lilly's birth. Mother stated that she would cooperate with the agency and work on identified issues; she never intended for "any of this to happen."

Father indicated he also would cooperate with the agency. He identified mother's consumption of alcohol as a problem in their relationship.

When assessed after the accident, Lilly was determined to be undernourished. Lilly would be starting kindergarten in the 2017 school year.

The report concluded by recommending that Lilly remain in out-of-home care and that both parents be provided reunification services.

A combined jurisdiction and disposition hearing was held on December 13, 2016. Mother submitted on the issue of jurisdiction and disposition. Father failed to appear at the hearing, although his counsel was present. The juvenile court found the allegations of the section 300 petition to be true. The juvenile court ordered continued out-of-home placement. Family reunification services were ordered provided to both mother and father.

Mother's case plan called for her to obtain and maintain suitable housing for herself and Lilly. Mother was to participate in parenting classes, substance abuse treatment for alcohol, and participate in Alcoholics Anonymous (AA). Mother was to demonstrate the ability to maintain sobriety and live free of alcohol, as well as to consistently and adequately parent her child. The case plan notified the parents they had 12 months to complete their case plan components and reunify with their child.

A six-month review hearing was scheduled for June 6, 2017. The status review report was filed May 26, 2017. The agency recommended continued reunification services for both parents and that Lilly remain in out-of-home care.

Mother had been in transitional housing but was discharged for noncompliance. Mother and father were currently living together. Mother was on probation but had missed a court date and there was an active warrant for her arrest. Mother admitted that she continued to drink alcohol and father was aware of this because they were living together.

Mother had enrolled in one parenting program but did not regularly participate and did not complete the program. Mother then enrolled in another parenting program offered by a different provider. With respect to the treatment program for alcohol abuse, mother had been discharged from one program after failing to complete it. Mother enrolled in a second alcohol abuse treatment program on May 16, 2017. Mother's case plan also required that she attend at least two AA meetings per week and provide proof of attendance. Mother was not in compliance with this component.

The agency prepared an updated case plan to address the ongoing problems. Mother signed the updated plan; father did not make himself available.

At the status review hearing, the juvenile court found that mother failed to make "substantive progress" on her court ordered case plan. The juvenile court found that mother and father had made only "minimal progress" on their respective case plans. Family reunification services were ordered to continue for both mother and father. It was ordered that Lilly remain in out-of-home care. The next hearing was scheduled for November 28, 2017, for a 12-month review hearing.

The status review report for the 12-month review hearing was filed on November 16, 2017. The status review report stated that mother had failed to complete the parenting component of her case plan. Mother had been discharged in June 2017 from

the second program in which she had been enrolled. Mother had not completed the parenting course at the time of her discharge.

Mother failed to complete an alcohol abuse treatment program and had been discharged from her second program prior to completion. Mother still had not provided any evidence of attendance at AA meetings.

Mother also was no longer in a stable housing situation. Father was not in compliance with the components of his case plan. Neither parent had maintained regular visitation.

The agency opined that both parents had made only minimal progress and it would be detrimental to return Lilly to either parent's custody. The agency noted that mother's stepmother was willing to provide care for the child long term under a guardianship or plan of adoption.

It was the agency's recommendation that at the 12-month review hearing, reunification services be terminated and a section 366.26 hearing be set.

Neither parent was present at the 12-month review hearing, although they were represented by counsel. Counsel submitted the matter on the report. Mother's stepmother reported that mother attempted to visit with the child the week prior to the hearing but was intoxicated.

The juvenile court found that reasonable services had been provided by the agency to mother and father and that the parents had made only minimal progress on their respective case plans. The juvenile court adopted the agency's recommendations that reunification services be terminated and a section 366.26 hearing be set.

The section 366.26 hearing was set for March 20, 2018. At the March 20, 2018 hearing, the agency asked for a continuance. The hearing was continued to June 19, 2018. On June 19, 2018, the matter was again continued to July 10, 2018.

Mother had filed a request to change order, pursuant to section 388, on May 29, 2018. Mother was asking for reunification services to be reinstated. The agency was

recommending the juvenile court deny mother's request, terminate parental rights, and order a permanent plan of adoption.

At the July 10, 2018 hearing, the juvenile court scheduled a contested hearing on the section 388 request to change order and the section 366.26 permanent plan hearing for July 31, 2018.

The section 366.26 report filed by the agency stated that Lilly had been in the current caregiver's home since June 13, 2017. The child had adjusted well and exhibited growth in both her social and emotional skills while in the home. The social worker opined that the caregiver had developed "a loving connection" with the child and had been a "consistent support system." The caregiver desired to continue to provide a stable and loving home for Lilly and was committed to a permanent plan of adoption, if parental rights were terminated.

The social worker noted that Lilly had known her caregiver since birth. The child was able to express her needs to the caregiver and "be a child." The caregiver had provided structure for Lilly's life and established routines. The social worker opined that the caregiver had demonstrated the emotional and financial capability to provide food, clothing, shelter, attention, and love for the child. The caregiver fully understood the obligations of adoption.

At the July 31, 2018, contested section 366.26 and section 388 hearing, the juvenile court admitted into evidence the request to change order and attachments, the agency's opposition to the change order, the section 366.26 report, and attachments and addendums thereto.

Mother testified at the contested hearing and admitted that during the dependency case, she had tested positive for cannabis and methamphetamine. Mother claimed she was no longer in a relationship with father. Mother admitted that she had not completed a parenting course. Mother testified she no longer had a drug or alcohol problem. She acknowledged that she missed scheduled visitations with Lilly.

During visits, mother testified Lilly was “smiling and she’s happy and she loves talking to me.” Mother testified she and Lilly would do arts and crafts, run around, and talk during visits. Mother believed Lilly wanted to continue to maintain a relationship with her because she is “happy to see me” and knows mother will be coming back to visit. Mother did not agree with the recommendation to terminate parental rights and place Lilly for adoption.

Mother opined that it would be in Lilly’s best interests “to live back with me.” Mother believed it was in Lilly’s best interests to grant her motion to change order and provide additional reunification services, so they could “reunite and be a happy family.”

On cross-examination, it was established that mother tested positive for amphetamine on March 15, 2018 and positive for methamphetamine on another date.

The social worker testified that adoption was discussed with Lilly and the child expressed no objections to being adopted by her caregiver. The child expressed that she wanted to remain in her current placement with her caregiver and not go anywhere else. Lilly also stated that she did not want to live with mother. The caregiver and prospective adoptive parent was mother’s stepmother, who indicated a willingness to allow contact between mother and Lilly to continue after adoption.

The social worker testified that mother and father appeared to currently be in a relationship, as demonstrated by their continuing contact. The agency found this to be of concern. The social worker noted that mother would not be completing a parenting program until April 2019; just began attending AA meetings in June 2018; and had not shown the ability to maintain sobriety and care for Lilly.

At the conclusion of testimony, the juvenile court heard argument from the parties. The agency argued that the section 388 request for change order be denied, parental rights be terminated, and a permanent plan of adoption be ordered. Counsel for the child asked the juvenile court to follow the recommendations of the agency.

After recessing to consider the evidence and argument, the juvenile court reconvened and announced its decision. The juvenile court first addressed the section 388 request to change order and noted that two positive drug tests were suggestive of continuing substance abuse issues. Mother had not been in “significant compliance” with her case plan and had been participating only a very short time in services. The juvenile court found that there was no change of circumstances. The juvenile court also found that mother did not prove that the change requested, specifically further reunification services, was in Lilly’s best interest. The section 388 request was denied.

The juvenile court then turned to the section 366.26 hearing. The juvenile court found that Lilly was adoptable. Regarding any beneficial parent-child relationship exception, the juvenile court noted that Lilly herself indicated to the social worker she did not want to live with mother and wanted to be adopted. The juvenile court also found that there was no evidence that maintaining a relationship with mother would confer more than an incidental benefit on Lilly. The juvenile court terminated parental rights and set a permanent plan of adoption.

Mother and father filed timely notices of appeal.

DISCUSSION

Mother contends the juvenile court erred in terminating her parental rights after denying her request under section 388 to reinstate reunification services. Mother contends the evidence established the beneficial parent-child relationship exception applied to her.

Father’s appeal raises no issues as to his termination of parental rights. However, he asserts that if the termination of mother’s parental rights is reversed, his parental rights also must be reinstated.

Section 388 Petition

We address mother's request to change order, also known as a section 388 petition, because it informs our discussion of mother's challenge to the termination of her parental rights.

A petition to modify a juvenile court order under section 388 must allege facts showing new evidence or changed circumstances exist, and that changing the order will serve the child's best interests. (§ 388, subd. (a)(1); *In re Nolan W.* (2009) 45 Cal.4th 1217, 1235.) We review the denial of a section 388 petition after an evidentiary hearing for abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318 (*Stephanie M.*)) When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court. (*Id.* at pp. 318, 319.) Where there is conflicting evidence, we reverse only if the evidence compels a finding for the appellant as a matter of law. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1527-1529.)

A parent may petition the court for such a modification on grounds of change of circumstances or new evidence. (§ 388, subd. (a)(1).) The parent, however, must also establish by clear and convincing evidence that the proposed change would promote the best interests of the child. (§ 388, subd. (b)(1); Cal. Rules of Court, rule 5.570(h)(1)(C).)

The best interests of the child are of paramount consideration when, as here, a section 388 petition is brought after reunification services have been terminated. (See *Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) In assessing the best interests of the child at this juncture, the juvenile court's focus is on the needs of the child for permanence and stability rather than the parent's interests in reunification. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) "A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point,

does not promote stability for the child or the child's best interests.” (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47 (*Casey D.*).)

The “escape mechanism” provided by section 388 after reunification efforts have ceased is only available when a parent has completed a reformation before parental rights have been terminated. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 528.) This is because, if a parent's circumstances have not changed sufficiently to permit placement of the child with that parent, reopening reunification “does not promote stability for the child or the child's best interests” when the child is otherwise adoptable. (*Casey D.*, *supra*, 70 Cal.App.4th at p. 47.) In assessing whether to grant the section 388 petition, the juvenile court may consider the entire history of the case. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189.)

Mother failed to demonstrate that circumstances had changed. At most, mother demonstrated that she was engaged in the effort of changing, however, mother had not satisfactorily completed programs. Mother would not be able to complete a parenting program until April 2019 because she had been discharged, unsatisfactorily, from two other parenting programs. Mother also missed scheduled visitations with Lilly, demonstrating a lack of understanding of the need for consistent parenting.

Mother had been discharged unsatisfactorily from two alcohol treatment programs; had just begun attending AA meetings in June 2018; and had tested positive for amphetamine and methamphetamine within a few months prior to the hearing. Mother had a long history of alcohol abuse, dating at least to 2011. Mother's efforts at sobriety were too recent to establish that mother's circumstances had changed and granting the section 388 request to change order was in Lilly's best interests. (See *In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1081 [parents with extensive drug use history did not show changed circumstances where rehabilitation efforts were only three months old at time of § 366.26 hearing]; *In re Clifton B.* (2000) 81 Cal.App.4th 415, 423 [seven months' sobriety does not constitute changed circumstance where parent has history of

periods of sobriety and relapse]; *In re Kimberly F.*, *supra*, 56 Cal.App.4th at p. 531, fn. 9 [“It is the nature of addiction that one must be ‘clean’ for a much longer period than 120 days to show real reform.”].)

Assuming arguendo the allegations in mother’s petition sufficiently showed her circumstances were changing, this showing was insufficient to require the court to change its earlier orders. (*Casey D.*, *supra*, 70 Cal.App.4th at p. 49.) If a parent’s circumstances have not changed sufficiently to permit placement of the child with that parent, reopening reunification “does not promote stability for the child or the child’s best interests” when the child is otherwise adoptable. (*Id.* at p. 47.)

As the Supreme Court explained in *Stephanie M.*, by the time a child’s dependency has reached the permanency planning stage, a parent’s interest in the care, custody, and companionship of the child is no longer paramount. Rather, the focus shifts to the child’s needs for permanency and stability, and, in fact, there is a rebuttable presumption that continued out-of-home care is in the best interests of the child. A court hearing a modification petition at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child. (*Stephanie M.*, *supra*, 7 Cal.4th 295 at p. 317.)

Parent-Child Benefit Exception

Having concluded the juvenile court did not abuse its discretion in finding that mother’s circumstances had not changed, and further reunification efforts were not in Lilly’s best interests, we turn to mother’s claim of a beneficial parent-child relationship exception. Once reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability. If the child is likely to be adopted, adoption is the norm. Indeed, the court must order adoption and its necessary consequence, termination of parental rights, unless one of the specified circumstances

provides a compelling reason for finding termination of parental rights would be detrimental to the child. (*In re Celine R.* (2003) 31 Cal.4th 45, 53.)

Although section 366.26, subdivision (c)(1) acknowledges termination may be detrimental under specifically designated circumstances, a finding of no detriment is not a prerequisite to the termination of parental rights. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1347.) It is the parent's burden to show termination would be detrimental under one of the exceptions. There is a strong preference for adoption. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.) When a juvenile court rejects a detriment claim and terminates parental rights, the appellate issue is whether the juvenile court abused its discretion. (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.)

For the section 366.26, subdivision (c)(1)(B)(i) exception to apply, known as the beneficial relationship exception, the relationship between parent and child must promote the well-being of the child to such a degree that it outweighs the well-being of the child in a permanent home with adoptive parents. The juvenile court balances the strength and quality of the natural parent-child relationship in a tenuous placement against the security and sense of belonging a new family would confer. If severing the natural parent-child relationship would deprive the child of a substantial and positive emotional attachment so that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*)).

Interactions between the natural parent and child will always confer some incidental benefit to the child. The significant attachment from child to parent results from the adult's attention to the child's needs for physical care, comfort, affection, and stimulation. The relationship arises from day-to-day interaction, companionship, and shared experiences. The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

The factors to consider when testing whether a parental relationship is important and beneficial include the age of the child, the portion of the child's life in the parent's custody, the positive or negative effect of interaction between the parent and child, and the child's particular needs. The relationship must be such that the child would suffer detriment from its termination. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 467.) Mother failed to show how Lilly would suffer detriment from the termination of her parental rights.

The dependency petition was filed in November 2016. The section 366.26 contested hearing was held 20 months later. During those 20 months, mother had supervised visits, some of which she missed. Mother testified to doing arts and crafts and talking with Lilly during supervised visits, and that Lilly was happy during visits. The parent bears the burden of showing more than loving contact and pleasant visits. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 953-954.) The parent has the burden of proving the statutory exception applies. (*In re Breanna S.* (2017) 8 Cal.App.5th 636, 646.) A parent who has failed to reunify with an adoptable child, as was the case here, may not derail adoption merely by showing the child would derive some benefit from continuing the parent-child relationship during periods of visitation. (*In re Jason J.* (2009) 175 Cal.App.4th 922, 937.)

Mother needed to demonstrate she occupied a parental role in Lilly's life resulting in a significant, positive, emotional attachment from child to parent. (*In re Breanna S.*, *supra*, 8 Cal.App.5th at p. 648.) Here, evidence of such a relationship was absent or inadequate. Mother's abuse of alcohol led to a single car accident on Highway 99 where the car mother was driving flipped over several times; Lilly was not in a proper car seat. Mother's license was suspended at the time the accident occurred. Mother previously had been intoxicated while caring for Lilly.

Lilly had not spent any substantial time in mother's care for the duration of the dependency, a period of 20 months. Lilly had expressed a desire to be adopted by her

current caregiver and did not want to live with mother. During the time Lilly was in mother's custody, she was subjected to mother's alcohol abuse and father's domestic violence. Lilly was undernourished at the time of the accident. Mother had failed to maintain sobriety and live free of alcohol, provide a safe and secure home, or consistently and adequately parent her child while Lilly was in her custody. Here, the evidence mother occupied a crucial parental role in Lilly's life was inadequate. (*In re L.Y.L.*, *supra*, 101 Cal.App.4th at p. 954.)

Mother failed to show detriment or harm if the parent-child relationship ended. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Mother testified that Lilly was happy to see her during visits, which was why mother wanted to maintain a parental relationship. There was no evidence, however, that Lilly was deeply bonded with mother and would suffer detriment if parental rights were terminated. The evidence established that Lilly wanted to be adopted by her caregiver; was happy and thriving in the placement with the caregiver; and had a loving relationship with the caregiver.

Mother did not meet her burden of establishing that Lilly would suffer great detriment, or any detriment, if her parental rights were terminated, such that it outweighed Lilly's need for security and stability, which she had with the prospective adoptive parent, mother's stepmother. Furthermore, any slight detriment was mitigated by the fact that mother's stepmother had stated she was willing to allow future contact between Lilly and mother after the adoption. The juvenile court did not abuse its discretion in terminating parental rights and allowing Lilly to be adopted by mother's stepmother. (See *In re Celine R.*, *supra*, 31 Cal.4th at p. 53.)

Father's Appeal

Father argued that if mother was successful in her appeal and the order terminating her parental rights was reversed, that would be grounds for reversing his termination of parental rights so that Lilly would maintain a relationship with both father and mother.

However, we have rejected mother's contention and therefore, reject this argument of father's.

DISPOSITION

The order denying mother's Welfare and Institutions Code section 388 request to change order is affirmed. The order terminating mother's and father's parental rights to Lilly and setting a permanent plan of adoption for Lilly is affirmed.